BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MATTHEW A. RATCLIFF	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,057,822
EASYHOME	)	
Respondent	)	
AND	)	
	)	
EMPLOYERS MUTUAL CASUALTY CO.	)	

ORDER

Respondent and its insurance carrier (respondent) requests review of the June 7, 2012 preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

The ALJ found that the evidence indicates claimant's accidental injury occurring on August 1, 2011, was the prevailing factor causing claimant's acute back injury and the need for treatment. The ALJ went on to find that claimant should follow the recommendations of Alan Moskowitz, M.D. and Brent Lancaster, M.D., and have bariatric surgery in order to lose weight so that he can then undergo back surgery to relieve him from the effects of the work injury. As such, the ALJ extended Dr. Moskowitz's authorization to treat the claimant and authorized Dr. Lancaster, a surgeon, to evaluate and treat claimant with bariatric surgery. Claimant needs back surgery, but is overweight at 390 pounds.

The respondent requests review of whether the accident is the prevailing factor in causing the need for bariatric surgery, whether the obesity, the medical condition giving rise to the need for bariatric surgery, arose out of and in the course of claimant's employment, and whether the ALJ exceeded her jurisdiction in granting the relief requested. Respondent argues that claimant's obesity is a medical condition that did not arise out of and in the course of claimant's employment as required by the amended workers compensation act effective May 15, 2011. Respondent concedes that claimant suffered a work accident on August 1, 2011, resulting in injury to his low back, but asserts

that the need for bariatric surgery is not a request for treatment of the back injury, but a request for treatment of a personal medical condition, which preexisted and is unrelated to his work injury.

Claimant argues that the Board doesn't have jurisdiction over this matter as the issue is a question of medical treatment, therefore the Board should dismiss respondent's appeal and the ALJ's Order should remain in full force and effect. In the alternative, claimant argues that the bariatric surgery that has been recommended is medical treatment that is reasonable and necessary to cure and relieve claimant from the effects of the injury to his low back.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant suffered an injury to his low back, on August 1, 2011. Respondent acknowledges that the low back injury arose out of and in the course of his employment with respondent. However, respondent contends that the recommended bariatric surgery is for a non-work related condition, i.e. claimant's pre-existing obesity. Claimant admits to having weight issues, standing 6 foot 1 inches tall and weighing between 376 and 400 pounds for years. Claimant has a history of back problems, with a prior work injury and claim in May 2009. Also, in July 2009, claimant was diagnosed with morbid obesity with a history of back strain, superimposed on degenerative disk disease at L5-S1, the same level as his current injury complaints and the recommended low back surgery.

Claimant testified that Dr. Moskowitz has recommended surgery on his low back, but won't do the surgery without claimant having bariatric surgery to help him lose weight. This bariatric surgery is being recommended in order to obtain a more favorable result from the back surgery. Dr. Moskowitz wants to perform the procedure by going in through claimant's abdomen arthroscopically.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-534a(a)(2) states in part:

> A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues

where it is alleged the administrative law judge exceeded his or her jurisdiction and the above listed issues which are deemed jurisdictional.

Claimant contends that the issue dealing with the order of the ALJ which allows the bariatric surgery to proceed as authorized medical treatment is a non-jurisdictional order for medical treatment. Respondent contends that it involves the issue regarding whether the injury arose out of and in the course of the employee's employment. The Board has addressed this issue on several occasions in the past. In *Trimble*[1], a Board Member held that gastric bypass surgery would benefit the claimant with both his diabetes and weight problem. That Board Member held that whether claimant's need for gastric bypass surgery is directly attributable to his work-related accident is an issue the Board may review on an appeal from a preliminary hearing order because it gives rise to the jurisdictional issue of whether the medical treatment is needed for an injury that arose out of and in the course of his employment.[2]

K.S.A. 2010 Supp. 44-508(e) states:

> (e) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 2011 Supp. 44-508(f)(3)(A) states:

> (3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or

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[1] *Trimble v Goodyear Tire and Rubber Co.*, No. 1,028,052, 2007 WL 1390703 (Kan. WCAB April 12, 2007).

[2] See also: *Ketterman v. City of Lawrence*, No. 1,030,872, 2008 WL 3280301 (Kan. WCAB July 22, 2008); *Morris v Creekstone Farms Premium Beef*, No. 1,053,851, 2011 WL 4011683 (Kan. WCAB Aug. 31, 2011).

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

(C) The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

The Kansas legislature, on May 15, 2011, passed an extensive rewrite of the Kansas Workers Compensation Act (Act). It is clear from the modification of the above statutes that the legislature intended to restrict the definition of the term “arising out of and in the course of employment” to specifically exclude not only injuries resulting from the normal activities of day-to-day living, but also to injuries which arise out of neutral risks, personal risks or from idiopathic causes. K.S.A. 44-508(d)(e)(f) further restricts the award of medical benefits by requiring that the accident or repetitive trauma be the “prevailing factor” in causing both the medical condition and the resulting disability or impairment.

K.S.A. 44-510h(a) states:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2011 Supp. 44-510h(a) states:

> (a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

The Kansas legislature, in rewriting the Act, made no modification of the language of K.S.A. 44-510h(a). It remains the responsibility of the employer to provide medical treatment "reasonably necessary to cure and relieve the employee from the effects of the injury." Respondent does not contend that claimant's back condition resulted from non-work related conditions. Rather, respondent argues that the need for bariatric surgery stems from the pre-existing obesity that claimant has had to deal with for years.

However, claimant's obesity is not the result of an accident or repetitive trauma. It is a pre-existing condition of claimant's. Additionally, the current need for bariatric surgery does not stem from the existence of claimant's obese condition. It stems from the need for back surgery necessitated by a work related injury, which cannot be effectively treated with claimant weighing almost 400 pounds. It is a specific surgical treatment which will aid Dr. Moskowitz in performing the recommended back surgery on claimant, to relieve claimant from the effects of the work-related accident. It is a means to an end.

MRI tests, CT scans, EMG tests and x-rays will not cure or relieve an employee of the effects of an injury. They are also a means to an end, i.e. they aid in the diagnosis and treatment of a medical condition which was brought about by a work injury. The bariatric surgery is one medical procedure or treatment, out of potentially several, which will hopefully ultimately lead to an improvement in or cure of claimant's medical condition. This Board Member finds that the medical need for the bariatric surgery satisfies the legislative intent contained in K.S.A. 44-510h(a). It is surgical treatment which is reasonably necessary to cure and relieve claimant from the effects of the low back injury suffered on August 1, 2011, while working for respondent. The Order of the ALJ allowing claimant the bariatric surgery is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[3] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

[3] K.S.A. 44-534a.

as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proving that the bariatric surgery proposed by Dr. Moskowitz is reasonably necessary to cure and relieve claimant from the effects of the August 1, 2011 accident and resulting injury. The Order of the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 7, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2012.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Nelsonna Potts Barnes, Administrative Law Judge